Supreme Court, U. S.
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No. 80-101

IN THE

Supreme Court of the United States

October Term 1980

James Henry Smith,
Petitioner,

v.

State of Washington,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

On December 1, 1977, petitioner James Smith was found guilty of possession of marijuana, in violation of Washington law. The defendant's prison sentence was deferred; he was placed on probation for three years and fined $500.00.

The facts underlying the charge have never been contested. Using marijuana seeds purchased at a local tavern, defendant began cultivating marijuana in two greenhouses located on his property. One of the greenhouses, 10 feet long by 8 feet wide, was located fifty feet from defendant's home.

For a period of approximately two years, Mr. Smith would smoke, on average, one or two marijuana cigarettes per day, occasionally in the presence of his two young children. He also provided marijuana to his wife and to visiting friends.

Law enforcement officers eventually learned of the marijuana garden and a warrant was issued authorizing a search of the residence as well as outbuildings on the property. The search warrant was executed on October 15, 1976. Marijuana was discovered during the course of the search, seized, and subsequently admitted into evidence during defendant's trial. The validity of the search warrant has never been challenged by the defense (Brief of Appellant at 3 n. 2).

The defendant moved to dismiss the information charging him with commission of a crime on three separate constitutional grounds: (1) violation of his right of privacy; (2) denial of equal protection; (3) imposition of cruel and unusual punishment (Petition at B4-B5). After a lengthy evidentiary hearing, the trial court denied the defense motion.

The same constitutional challenges were again raised

on appeal and also rejected by the Washington Supreme Court. *State v. Smith,* 93 Wn.2d 329, 332-33, 610 P.2d 869 (1980). Although the court divided on the issue of cruel and unusual punishment, both the majority and the dissent concluded that the constitutional right of privacy does not protect the use and possession of marijuana in the home. *Id.* at 345-48, 355. Chief Justice Utter, concurring in part and dissenting in part, did not reach the invasion of privacy claim. *Id.* at 354.

Defendant does not seek review in this Court of the equal protection and cruel and unusual punishment claims. Although the petition is in one sense limited to the right of privacy issue, defendant has reformulated his constitutional argument in terms of an asserted Fourth Amendment violation. Defendant now contends, for the first time, that the seizure of marijuana from a home pursuant to a search warrant is per se unreasonable (Petition at 23).

This contention was neither presented to nor passed on by either of the courts below. In fact, defendant's 95-page opening brief to the Washington Supreme Court contained only a passing reference to the Fourth Amendment (Brief of Appellant at 33-34), which did not warrant inclusion in his 13-page Table of Authorities.

SUMMARY OF ARGUMENT

The question presented in this petition, asserting a violation of the Fourth Amendment, was neither raised nor decided in the lower state courts. Even assuming that the issue is properly before this Court, there is no merit in the defendant's argument.

Having neglected to challenge the validity of the search warrant, the defendant is restricted to the position that any warranted search of a home for marijuana is per se

unreasonable. This contention is faultily premised on the defense assumption that the State of Washington has no legitimate governmental interest in regulating the private use and possession of marijuana, a view which was expressly repudiated by the Washington Supreme Court. Furthermore, the Fourth Amendment claim is particularly inapplicable to the facts of the present case, involving seizure of marijuana not only from the defendant's home, but also from a greenhouse situated 50 feet from his home.

The defendant did raise the right of privacy issue in the courts below, though not in the context of a Fourth Amendment claim. The Washington Supreme Court concluded that the federal constitutional right of privacy does not encompass the private possession of marijuana in the home.

Contrary to the defendant's assertion, there is no authority in conflict with the state court's decision on this federal issue. Recognizing that the use and possession of marijuana does not implicate any specific constitutional guarantee and cannot be constitutionally distinguished from the possession of other prohibited drugs, lower courts have consistently rejected similar privacy challenges.

ARGUMENT

I.

THE FEDERAL QUESTION PRESENTED FOR REVIEW WAS NEITHER RAISED NOR DECIDED BELOW.

It is well-settled that this Court "will not decide federal constitutional issues raised here for the first time on review of state court decisions," *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969), though there is some ambiguity as to whether the rule is based on jurisdictional or policy grounds.

The defendant's presentment of the issue and argument are not straightforward. Although reference is made to the constitutional right of privacy (Petition at 32, 35), which was clearly raised below, the essence of defendant's argument is that the search of his property was unreasonable, in violation of the Fourth Amendment.

> This Petition asks this Court to decide one limited and fundamental issue: whether, under the Fourth Amendment, there is a general right to be free from searches of homes which are 'unreasonable' because they are aimed at purely private activity which neither involves nor affects anyone other than the homeowner himself;

(Petition at 23).

Having so postured the issue, petitioner has erected substantial barriers to review. As previously stated, no Fourth Amendment issue was raised or decided in the state courts below. Nor was the validity of the search warrant ever contested.[1]

The record here is even more inadequate than that in *DeBacker v. Brainard,* 396 U.S. 28 (1969). In *DeBacker,* this Court declined to review a contention where the appellant "made only passing reference to the issue in his brief" to the Nebraska Supreme Court and the state court "did not pass on the issue, nor even refer to the contention." 396 U.S. at 32. *See also United States v. Ortiz,* 422 U.S. 891, 898 (1975).

But the most blatant deficiency here is the inconsistency between the defendant's Fourth Amendment claim, focusing on the privacy of the home, and the facts surrounding the search and seizure of his marijuana. Marijuana was seized from a greenhouse located approximately 50 feet

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1. Attorney Ford has represented the defendant throughout these proceedings.

from the defendant's home, as well as from the home itself.

The lower courts were not given an opportunity to determine whether or not this greenhouse was situated within the curtilage of the defendant's home. If it were not, and the "open fields" doctrine governed, the greenhouse would not be entitled to any Fourth Amendment protection. *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), reaffirming *Hester v. United States*, 265 U.S. 57 (1924).

The inappropriateness of permitting review of this untimely issue could not be more evident.

II.

THE SEIZURE OF MARIJUANA FROM A PRIVATE RESIDENCE PURSUANT TO A VALID SEARCH WARRANT DOES NOT VIOLATE THE FOURTH AMENDMENT.

There is no precedent in this Court suggesting that the seizure of marijuana from a home pursuant to a valid search warrant might constitute an unreasonable search. On the contrary, "valid warrants may be issued to search *any* property . . . at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found." *Zurcher v. Stanford Daily*, 436 U.S. 547, 554 (1978).

Defendant's reliance on *Payton v. New York*, ... U.S. ....., 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), is misplaced. *Payton* merely reiterated the cardinal principle that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." 100 S.Ct. at 1382. Here, of course, the State obtained a warrant, which has never been challenged and must be presumed valid.

The special constraints placed upon search warrants directed at material arguably protected by the First Amendment, *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979), have never been extended to seizures of "weapons, narcotics or cases of whiskey." *Stanford v. Texas,* 379 U.S. 476, 486 (1965). *See also Roaden v. Kentucky,* 413 U.S. 496 (1973).

The additional safeguards afforded books, pamphlets and movies derives from the unique vulnerability of protected expression. "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Marcus v. Search Warrants,* 367 U.S. 717, 731 (1961).

The rationale of these First Amendment cases is plainly inapplicable to the seizure of contraband. Defendant's argument that marijuana should be given special Fourth Amendment protection necessarily rests on his assertion that the private use and possession of the drug "impact no cognizable state interest." (Petition at 34). Neither the evidentiary record compiled below nor the decisional law, including the opinion of the Washington Supreme Court, supports such an assumption.

III.

THE STATE OF WASHINGTON MAY CONSTITUTIONALLY REGULATE THE PRIVATE USE AND POSSESSION OF MARIJUANA.

It is firmly established that the State of Washington may, in the exercise of its police power, regulate the use and possession of dangerous or habit-forming drugs. *Robinson v. California,* 370 U.S. 660 (1962); *Whipple v. Martinson,* 256 U.S. 41 (1921).

Correctly applying the rational relation test,[2] the Washington Supreme Court found that the state legislature could have reasonably concluded that marijuana is a dangerous drug.

> Our review of the record reveals certain critical facts which show that marijuana presents certain dangers, and that its prohibition is reasonably related to the public health and safety. Marijuana creates a euphoric state of intoxication which impedes learning, incentive, efficiency, and, importantly, motor coordination. There remains a conflict of expert opinions regarding the seriousness of marijuana's effects, and much has yet to be learned. From reading this record, we cannot say that all doubts about the safety of marijuana have been resolved in its favor.
>
> Assuming that the legislature had before it the evidence in this case concerning the known effects of marijuana and the as yet unknown properties of the drug, it could reasonably find that marijuana creates a danger to users and others.
>
> Furthermore, the legislature may well have considered more evidence than was brought before the trial court in this case. We cannot say, therefore, that the adoption of laws imposing criminal penalties was not reasonably indicated to protect the public welfare.
>
> We note that the apparent dangers of marijuana use have been recognized by other courts. Recent judicial opinions, including *Ravin v. State*, 537 P.2d 494 (Alaska 1975), find that in spite of advanced knowledge the suggested

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2. "Where . . . the Congress has neither invaded a substantial constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate government interest." *Harris v. McRae*, 48 U.S.L.W. 4941, 4949 (U.S., June 30, 1980).

dangers are, as yet, rationally based. *See also Marcoux v. Attorney General,* ..... Mass. ....., 375 N.E.2d 688 (1978), *and see Blincoe v. State,* 231 Ga. 886, 204 S.E.2d 597 (1974); *State v. Kells,* 199 Neb. 374, 259 N.W.2d 19 (1977); *and see People v. Summitt,* 183 Colo. 421, 517 P.2d 850 (1974).

> In legislating for health, safety and welfare, certain constraints upon individual freedom have traditionally been imposed by the State. Often, such constraints protect both society generally and the individual personally from the perceived harm. *See e.g., State v. Laitinen, supra* (motorcycle helmet law sustained). It is not our proper function to substitute our judgment for that of the legislature with respect to the necessity of these constraints.
>
> We hold the statutory prohibitions against marijuana use are rationally related to the accomplishment of a legitimate governmental objective — public health and safety. As such, they are not violative of equal protection.

State v. Smith, supra at 93 Wn.2d 338-39 (notecalls omitted).

The court's finding was based on an independent review of the extensive evidentiary record. *Id.* at 335. It is consistent with the recent decision of a three-judge panel of the United States District Court for the District of Columbia, also made after a lengthy hearing on the effects of marijuana.

> Experts still strongly disagree about the safety of marijuana, and its long-term effects remain an open question. Studies indicate that marijuana may impair the circulatory, the endocrine, and the immunity systems of the body, alter chromosomes, and change cell metabolism. Although many dispute these findings, this contradictory

> evidence demonstrates that important questions about marijuana use persist.
>
> Given the continuing debate over marijuana, this court must defer to the legislature's judgments on disputed factual issues.

NORML v. Bell, 488 F.Supp. 123, 136 (D.D.C. 1980).

The federal district court recognized, as did the Washington Supreme Court, that "judicial deference is appropriate when difficult social, political, and medical issues are involved. Courts should not step in when legislators have made policy choices among conflicting alternatives." *NORML v. Bell, supra* at 137.

That it is not the function of the judiciary to make an independent appraisal of competing interests was clearly enunciated by this Court in resolving a challenge to another controversial enactment. "It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy." *Harris v. McRae,* 48 U.S.L.W. 4941, 4949 (U.S., June 30, 1980).

It cannot seriously be disputed that the State of Washington has the constitutional authority to proscribe the use and possession of marijuana.

IV.

THE FEDERAL CONSTITUTIONAL RIGHT OF PRIVACY DOES NOT ENCOMPASS THE PRIVATE POSSESSION OF MARIJUANA IN ONE'S HOME.

If the State of Washington has a legitimate interest in prohibiting the private use and possession of marijuana, that interest does not disappear upon a person's entrance to his home.[3] On the contrary, "[t]he mere fact that this

3. *See Doe v. Commonwealth's Attorney,* 403 F.Supp. 1199, 1202 (E.D. Va. 1975), *aff'd,* 425 U.S. 901 (1976).

otherwise unprotected activity is conducted in the home does not, in itself, place it in the protected zone of the constitutional right of privacy." *Illinois NORML v. Scott*, 66 Ill. App. 3d 633, 23 Ill. Dec. 303, 383 N.E.2d 1330, 1332 (1978).

Defendant's contention that the United States Constitution guarantees the right to possess and use marijuana in one's home has been rejected by lower federal and state courts with monotonous regularity.[4] These authorities have not accepted proposals to extend *Stanley v. Georgia*, 394 U.S. 557 (1969), to include the private possession of marijuana.

In holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime,"[5] *Stanley v. Georgia, supra* at 568, this Court specifically limited the scope of its opinion.

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4. No less than fourteen decisions have upheld state proscription of private marijuana possession in the home, not including the opinion of the Washington Supreme Court. *United States v. Drotar*, 416 F.2d 914 (5th Cir. 1969), *vacated on other grounds*, 402 U.S. 939 (1971); *NORML v. Bell*, 488 F.Supp. 123 (D.D.C. 1980); *Louisiana NORML v. Guste*, 380 F.Supp. 404 (E.D. La. 1974), *aff'd*, 511 F.2d 1400 (5th Cir.), *cert. denied*, 423 U.S. 867 (1975); *State v. Murphy*, 117 Ariz. 57, 570 P.2d 1070 (1977); *Laird v. State*, 342 So.2d 962 (Fla. 1977); *Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974); *State v. Baker*, 535 P.2d 1394 (Hawaii 1975); *State v. Kincaid*, 98 Idaho 440, 566 P.2d 763 (1977); *Illinois NORML v. Scott*, 66 Ill. App.3d 633, 23 Ill. Dec. 303, 383 N.E.2d 1330 (1978); *State v. Chrisman*, 364 So.2d 906 (La. 1978); *Marcoux v. Attorney General*, ... Mass. ...., 375 N.E.2d 688 (1978); *State v. Kells*, 199 Neb. 374, 259 N.W.2d 19 (1977); *People v. Shepard*, ... N.Y.2d ...., ... N.E.2d .... (June 6, 1980); *Cavaness v. State*, 581 P.2d 475 (Okla. Cr. App. 1978), *cert. denied*, 439 U.S. 1117 (1979).

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5. Three Justices concurred in the result on the ground that the unauthorized screening of films violated the Fourth Amendment. The rationale of the concurring opinion formed the basis of this Court's opinion in *Walter v. United States*, 48 U.S.L.W. 4807 (U.S., June 20, 1980).

> What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.

Id. at n. 11.

Thus, the simple response to the question presented by this petition is that the decision of the Washington Supreme Court does not conflict with *Stanley v. Georgia.*

The rationale underlying the disparate constitutional treatment afforded obscenity and drugs such as marijuana is readily apparent. The holding in *Stanley* derived not only from the First Amendment implications of the case,[6] but also from the absence of public impact of the proscribed activity. *See Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 59 (1973). The State cannot here improve on the analysis and reasoning of the Massachusetts Supreme Judicial Court.

> Thus the *Paris Adult Theatre and Orito* cases were stressing the point that in *Stanley* the place of the possession, the confinement of the viewing of the material, reduced to a null force, or nearly so, any claim of deleterious public effects which could possibly legitimate the State's intrusion . . . The *Stanley* Court had indeed said, replying to the argument that the private reading of obscene matter would cause antisocial conduct, that there was 'little empirical basis' for

6. Defendant's belated attempt to ground his privacy claim in the Fourth Amendment demonstrates his recognition that the right of privacy encompasses only fundamental liberties and those rights created by specific constitutional guarantees. *Paul v. Davis,* 424 U.S. 693, 712-13 (1976).

> that assertion (394 U.S. at 566, 89 S.Ct. 1243) and in all events the 'least restrictive alternative' analysis familiar in First Amendment discussions would require that the State legislate against the antisocial behavior rather than the ideas that caused it. In contrast, in the case of marijuana, we are bound to assume for constitutional purposes that the private use does have public results, does spill over into the public domain and touch matters of legitimate State interest, while the freedom impaired by the penal statute, taken at its highest evaluation, does not reach the level of that freedom conceived by the Court to be implicated in *Stanley*.

Marcoux v. Attorney General, ... Mass. ....., 375 N.E. 2d 688, 691 (1978).

Since defendant has not contested the findings of the Washington Supreme Court concerning the dangerousness of marijuana, his assertion that the private use of marijuana "demonstrably affects no public interest" (Petition at 23) is not persuasive.

However, the protection of the public from the harmful effects of marijuana is not the only state interest served by proscription. As the trial court recognized (petition at B27), the State of Washington has a legitimate and permissible objective in protecting the public from the intoxicating effects of the drug.

The governmental interest in prohibiting marijuana intoxication flows from the founding principles of our nation. The most fundamental concept of the democratic process is the free exchange of political ideas. To this end, the First Amendment functions to ensure that there will be a "marketplace of ideas," open to all political ideas, even those that perhaps a majority of citizens consider reprehensible. The risk of our democratic experiment is whether the "right" ideas shall prevail. In

short, the determinative factor in the success or failure of our system of government is the ability of the people to consider and decide the proper course for our nation to follow.

What governmental interest could then be more vital than the interest of insuring, to the extent possible, that the people are educated, mentally competent and in possession of reasoning powers sufficient to deal with complex political issues. The defense experts did not disagree with the trial court's finding concerning the effects of marijuana intoxication on the mind:

> Marijuana does interfere with the orderly processes of the mind . . . complex reasoning is interfered with, as is the ability to concentrate effectively . . . there is reliable evidence that information acquired during intoxication is not stored efficiently in the memory centers of the brain. (Petition at B17).

In analyzing the nature of marijuana as an intoxicant, potency is not the only significant factor. The drug is easily concealed and difficult to detect once ingested. One may become intoxicated from marijuana in a relatively brief period of time. Nor are there any harsh after-effects as is the case with alcohol intoxication.

Marijuana is a vastly more comfortable intoxicant to use than alcohol[7] and therein lies its greatest danger. A user, even an adolescent user, may spend a significant portion of his life intoxicated and, consequently, in an impaired mental state.

Indeed, a recent report submitted by the defendant himself shows that "[a]mong high school seniors nation-

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7. The State of Washington may constitutionally prohibit the private possession of intoxicating liquor, though it has chosen not to do so. *Crane v. Campbell,* 245 U.S. 304 (1917); *Mugler v. Kansas,* 123 U.S. 623 (1887); *State v. Giaudrone,* 109 Wash. 397, 186 P. 870 (1920).

wide, one in eleven reports using [marijuana] on a daily basis, up from one in twelve in 1976 and one in seventeen in 1975." MARIJUANA AND HEALTH, Seventh Annual Report to the U.S. Congress from the Secretary of Health, Education and Welfare at 2 (1978).

Defendant's argument is premised on his view that there are no social costs associated with the private use of marijuana. The State of Washington could not disagree more strongly.

V.

THERE IS NO CONFLICT OF AUTHORITY ON THE FEDERAL QUESTION PRESENTED.

Defendant asserts that the lower courts are divided on the federal right of privacy issue,[8] a split which he characterizes as "not wide [b]ut . . . deep." Petition at 41). The State of Washington submits that not only is the conflict of authority neither wide nor deep, in reality it is nonexistent.

In addition to some dissenting and concurring opinions, defendant relies on *State v. Kantner,* 53 Hawaii 327, 493 P.2d 306 (1972), *cert. denied,* 409 U.S. 948 and *Ravin v. State,* 537 P.2d 494 (Alaska 1975).

In *State v. Kantner, supra,* the Hawaiian Supreme Court upheld the classification of marijuana as a narcotic drug against an equal protection challenge. Defendant quotes dicta in the concurring and dissenting opinions in *Kantner* concerning the extent of the right of privacy.

The precedential value, if any, of these opinions was

8. There can hardly be a conflict of authority on the question of whether the seizure of marijuana from a home under warrant is per se unreasonable. The State is not aware of any case in which this "limited and fundamental issue" has even been raised, let alone decided.

nullified by the Hawaii Supreme Court's subsequent decision in *State v. Baker,* 535 P.2d 1394 (Hawaii 1975). *Baker* held, in the context of a privacy challenge, that neither that state's nor the federal constitution protects the possession of marijuana for personal use.

Defendant's reliance on *Ravin v. State, supra,* is equally misplaced. *Ravin* rested on a state constitutional provision, adopted in 1972, which explicitly guaranteed a right of privacy. Alaska Const., Art. 1, §22.

> Thus, we conclude that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home . . . .

Ravin v. State, supra at 504.

Far from creating a conflict on the federal question presented, *Ravin* has been widely perceived (and dismissed) as a decision on state constitutional grounds. *E.g., NORML v. Bell, supra* at 132 n. 23 ("The Alaska Court based its ruling on a new provision of the state constitution . . . ").

The Alaska Supreme Court has acknowledged that its holding in *Ravin* exceeded the scope of the federal constitutional right of privacy. Citing *Ravin,* the court recently conceded, "We think it clear from both section 22 and our decisional law that the right of privacy guaranteed to Alaska citizens is broader in scope than that guaranteed in the federal constitution." *State v. Daniel,* 589 P.2d 408, 416 (Alaska 1979).

In fact, the precedential impact of *Ravin* has been so insignificant that other state courts have declined to follow it in interpreting recent amendments to their own con-

stitutions also explicitly guaranteeing a right of privacy. *NORML v. Gain,* 100 Cal. App.3d 586, 161 Cal. Rptr. 181 (1979); *Zander v. District Court,* 591 P.2d 656 (Mont. 1979).

There is no conflict of authority on the federal question presented for review. The decisional law is logical, comprehensive and dispositive. As petitioner concedes, this Court has thrice previously denied petitions for certiorari raising the issue.[9] The same disposition is particularly appropriate here, where the petitioner has revised and restructured his argument in a manner not presented to the state courts below.

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9. *Louisiana NORML v. Guste,* 380 F.Supp. 404 (E.D. La. 1974), *aff'd,* 511 F.2d 1400 (5th Cir.), *cert. denied,* 423 U.S. 867 (1975); *State v. Kantner,* 53 Hawaii 327, 493 P.2d 306 (1972), *cert. denied,* 409 U.S. 948; *Cavaness v. State,* 581 P.2d 475 (Okla. Cr. App. 1978), *cert. denied,* 439 U.S. 1117 (1979).

CONCLUSION

For the above-stated reasons, the State of Washington submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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